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MAR 26 1931
CHARLES ELMORE CROP
CLERK

In the

SUPREME COURT OF THE UNITED STATES

No. [redacted] October Term, 1930.

The Texas and Pacific Railway Company et al., Appellants,

versus

The United States of America et al., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

MOTION BY APPELLANTS FOR AN ORDER DIRECTING THAT THE LOUISIANA PUBLIC SERVICE COMMISSION BE JOINED AS AN APPELLANT.

THOS J. FREEMAN,
ESMOND PHELPS,
A. L. BURFORD,
R. E. MILLING, JR.,
LUTHER M. WALTER,
JOHN ST. PAUL, JR.,
PERCY SAINT,
W. M. BARROW,
ROBERT L. W. THOMPSON,
Solicitors for Appellants.

WARLICK LAW PRINTING CO.—DALLAS

In the

SUPREME COURT OF THE UNITED STATES

No. 744, October Term, 1930.

The Texas and Pacific Railway Company et al., Appellants,

versus

The United States of America et al., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

MOTION BY APPELLANTS FOR AN ORDER DIRECTING THAT THE LOUISIANA PUBLIC SERVICE COMMISSION BE JOINED AS AN APPELLANT.

COME Now the appellants herein, namely, The Texas and Pacific Railway Company, Louisiana & Arkansas Railway Company, Louisiana Railway & Navigation Company, Louisiana, Arkansas & Texas Railway Company (formerly Louisiana Railway & Navigation Company of Texas), The State of Louisiana, Board of Commissioners of the Port of New Orleans, New Orleans Joint Traffic Bureau, Board of Trade of Kansas City, Mo., Grain Dealers Association of Oklahoma, Oklahoma Millers Association, St. Joseph Grain Exchange, Omaha

Grain Exchange, Atchison Board of Trade, Terrell Chamber of Commerce, and Monroe Traffic Bureau, aud present this their motion asking that their assignment of errors (Tr. 5222-46)* petition for appeal filed herein (Tr. 5247-50), together with the citation issued (Tr. 5314-17) and the appeal bond filed pursuant thereto (Tr. 5255-59), be amended by adding thereto and joining therein as a party appellant the Louisiana Public Service Commission, which was permitted to become an intervenor in cause No. 186, In Equity, then pending in the court below, to wit, the United States District Court for the Southern District of Texas, Galveston Division, and respectfully pray that an order be entered herein by this Honorable Court authorizing and directing that such amendment be made in the aforesaid assignment of errors and petition for appeal and in the citation issued thereon, and further permitting the appellants herein to file in this Court an amended appeal bond including as one of the principals therein the said Louisiana Public Service Commission as one of the appellants, which they hereby offer to do, and that they be accorded such other and further relief to which in justice and equity they may be entitled.

In explanation and substantiation of the foregoing motion, these appellants respectfully represent unto the Court as follows:

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*References are made to pages of the certified unprinted transcript prepared by the Clerk of the District Court and on file with the Clerk of this Court, the record not yet having been printed.

I.

That on February 11, 1930, cause No. 186, In Equity, entitled The Texas and Pacific Railway Company v. The United States of America, wherein an injunction was sought to set aside certain orders of the Interstate Commerce Commission relating to the inland rail rates on shipments to and from certain gulf ports in Louisiana and Texas of divers commodities in export, import, and/or coastwise movement, was docketed in the United States District Court for the Southern District of Texas, Galveston Division, and on or about April 10, 1930, after all other interventions therein had been received and filed, an intervention pursuant to order duly entered (Tr. 350-55) was filed therein by the Louisiana Public Service Commission, acting through its duly constituted chairman, Hon. Francis Williams, but thereafter said intervenor filed no brief and took no active part otherwise in the proceedings had in said cause in the trial court; neither does the name of said Commission appear in the decree of dismissal (Tr. 5220-21) from which this appeal was taken.

II.

That on March 20, 1930, an order was entered (Tr. 222-23) by the District Court in said equity cause No. 186 providing in part that all interventions therein be filed and served not later than April 5th and that no

intervention would be filed thereafter unless for good cause the court should order otherwise; that on or about April 16, 1930, the clerk of said District Court prepared and served upon Messrs. Andrews, Streetman, Logue & Mobley, of Houston, Texas, who had been formally designated by petitioner in said equity cause No. 186 as its resident counsel in the Southern District of Texas, a document which purported to be a list of all intervenors in that cause, as well as in equity cause No. 187 consolidated therewith, but did not in fact include therein the name of the Louisiana Public Service Commission; that such list of intervenors was transmitted under date of April 17, 1930, by Messrs. Andrews, Streetman, Logue & Mobley to the General Attorney of The Texas and Pacific Railway Company, petitioner in said equity cause No. 186, with residence at Dallas, Texas, and thereupon came to the attention of Robert L. W. Thompson, one of counsel of record for said petitioner; that a duly certified copy of the aforesaid list of intervenors is being transmitted herewith for filing, and for convenience is being reproduced as Exhibit "A" hereto; that these appellants in no sense question either the propriety or the validity of the order allowing the intervention of the Louisiana Public Service Commission as aforesaid, the facts set forth in this paragraph being recited solely for the purpose of showing cause for their failure to join said intervenor as one of the parties to this appeal.

III.

That the attorney who had direct charge of the preparation of the assignment of errors, the petition for appeal, the citation issued thereon, and the appeal bond signed pursuant thereto, namely, Robert L. W. Thompson, who resides in Dallas, Texas, and therefore did not have ready access to the records of the United States District Court at Galveston, Texas, some three hundred miles or more distant from Dallas, Texas, had no personal knowledge of the filing of said intervention of the Louisiana Public Service Commission in said cause until after the petition for appeal and the appeal bond had been prepared and filed, and the citation issued and served upon the appellees.

IV.

That it was the purpose and intention of these appellants to join all intervenors in the court below in the appeal taken herein, either as appellants or as appellees, but because of the want of knowledge on the part of their said attorney that said Louisiana Public Service Commission had become a party to said proceeding, as aforesaid, he failed and omitted to include such intervenor in the petition for appeal or in the other appeal papers, either as an appellant or as an appellee, which otherwise would have been done, and for the same

reason no steps were taken looking to the issuance of a summons and severance as to said Commission.

V.

That said Louisiana Public Service Commission is not a shipper or receiver of freight, nor is it a common carrier or handler otherwise of freight, and in particular freight moving in export, import, and/or coastwise commerce, such as is subject to and affected by the orders of the Interstate Commerce Commission under review herein, its interest in these proceedings and the rights incident thereto being different from and independent of those of the petitioner in the court below and also those of the other intervenors against whom the decree of dismissal was entered therein, appellants herein.

That the respective orders of the Interstate Commerce Commission which are under review herein (Tr. 70-94) are directed solely against certain common carriers subject to its jurisdiction, including the petitioner in said equity cause No. 186, The Texas and Pacific Railway Company, and not against the aforesaid intervenor, to wit, the Louisiana Public Service Commission, nor is the decree of the trial court from which this appeal has been taken (Tr. 5220-21) such a mandatory decree as does or will operate affirmatively against any

of the parties to said proceeding, including said Louisiana Public Service Commission, intervenor therein, requiring them to do or not to do some specified act or thing, but on the contrary it was merely a decree of dismissal denying to the petitioner therein the relief sought by it, nor was there any execution pursuant to such decree or contemplated thereby issued against any party to said cause.

VI.

That under the holding of this Court in *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, the Louisiana Public Service Commission had no legal right of appeal herein independently of the appeal taken by these appellants from the decree of dismissal entered herein by the trial court, and hence was not in a position either to vex this Court by making it necessary for the members thereof to pass upon the same questions upon the same record more than once (see *Masterson* v. *Herndon*, 10 Wall. 416, 417), or to harass the appellees herein by prosecuting an independent appeal from said decree of dismissal. Accordingly, the underlying reason for the rule having no existence in this appeal, the rule itself should not be permitted to prevail.

VII.

That in the case of *Inland and Seaboard Coasting Co.*

v. *Tolson*, 136 U. S. 572, this Court first granted a motion to dismiss the writ of error therein on the ground that no mention was made in the writ of the sureties against whom judgment was rendered in the court below along with the plaintiff in error; that thereafter a motion was presented to this Court to restore the case to the docket and for leave to amend the writ of error by inseting therein as plaintiffs in error the names of the several omitted parties, wherein it was urged in part that such action might properly be taken under the authority conferred by § 1005 of the United States Revised Statutes (U. S. C., Tit. 28, § 873); that in opposing this motion, as stated in the Court's opinion, it was urged by counsel for defendant in error that the objection to the writ was jurisdictional, and that it could not be cured by amendment, but the Court nevertheless directed that the writ be amended by adding thereto the names of the parties omitted and thereupon restored the case to the docket; that by Act of Congress of January 31, 1928, 45 Stat. 54 (U. S. C., Tit. 28, § 861a), the writ of error was abolished and the right of appeal substituted therefor, and by Act of Congress of April 26, 1928, 45 Stat. 466 (U. S. C., Tit. 28, § 861b), it was provided that the statutes regulating the right to a writ of error, "and prescribing the mode of exercising that right and of invoking such relief", shall be applicable to the appeal which is substituted for a writ of error, from

which it follows, we respectfully urge, that the provisions of said § 1005 of the Revised Statutes may now logically be extended so as to afford similar relief in the case of appeals to this Court. (See *Bragg* v. *Weaver*, 251 U. S. 57, at pages 61-62).

VIII.

That in *Sipperly* v. *Smith*, 155 U. S. 86, 89, wherein a motion to dismiss the appeal was sustained, it was remarked significantly in the Court's recital of the facts that no application was made in the Supreme Court for the issue of citation to the parties not joined in the appeal, nor for leave to perfect the appeal as to them, and that none of the omitted parties appeared in that Court, the obvious implication being that the Court considered that it had the power and authority to order such amendment of the pleadings and process as might have been necessary to cure the defects therein had proper steps to that end been taken; that the decision of this Court in *Inland and Seaboard Coasting Co.* v. *Tolson*, *supra*, has been so interpreted by the Circuit Court of Appeals for the Fifth Circuit in the case of *The Mary B. Curtis*, 250 Fed. 9, 11; *The Segurance*, 250 Fed. 19, *National Surety Co.* v. *Leflore County, Miss.*, 262 Fed. 325. (See also *Clarke v. Boysen*, 39 Fed. (2d)

800, 821-22; *Gilbert* v. *Hopkins*, 198 Fed. 849, 850-51; *Teel* v. *Chesapeake & O. Ry. Co.*, 204 Fed. 915, 916-17.

IX.

That it is provided in part in § 954 of the United States Revised Statutes (U. S. C., Tit. 28, § 777), that no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form; and such court shall amend every such defect and want of form, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe; that it has recently been declared by this Court in the case of *Norton* v. *Larney*, 266 U. S. 511, at page 516, in giving effect to this statute, that its power thereunder to allow such amendments in its discretion, and its duty to do so in appropriate cases, can not be doubted. Since both § 954 and § 1005 of the Revised Statutes are remedial in their nature, they each should be applied liberally so as to effectuate the legislative intent. (See *Stewart* v. *Kahn*, 11 Wall. 493, 504; *Heitler* v. *United States*, 260 U. S. 438, 440).

X.

That since the aforesaid decree was entered from which this appeal has been taken, and since said appeal was perfected, there has been no change in the status of the parties hereto nor in the subject-matter of this litigation such as would prejudice in any respect the rights of appellees herein, or any of them, should this Honorable Court grant the relief herein sought by appellants, but on the contrary, if the relief so sought is granted, the status of the parties hereto will be precisely the same as it would be had said Louisiana Public Service Commission been included originally in the appeal among the parties appellant herein.

Respectfully submitted,

THOS J. FREEMAN,
ESMOND PHELPS,
A. L. BURFORD,
R. E. MILLING, JR.,
LUTHER M. WALTER,
JOHN ST. PAUL, JR.,
PERCY SAINT,
W. M. BARROW,
ROBERT L. W. THOMPSON,
Solicitors for Appellants.

THE STATE OF TEXAS)
) ss:
COUNTY OF DALLAS)

ROBERT L. W. THOMPSON, being first duly sworn, upon his oath deposes and says that he is one of the Solicitors for The Texas and Pacific Railway Company, petitioner in equity cause No. 186 in the District Court and one of the appellants in this Court in cause No. 744, October Term, 1930; that he prepared the foregoing motion and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge and belief, and that he is authorized to make this affidavit on behalf of the appellants.

ROBERT L. W. THOMPSON.

SUBSCRIBED AND SWORN TO before me this 17th day of March, A. D. 1931.

(Seal)

B. K. HOLLOWAY,
Notary Public, Dallas County, Texas.

My commission expires May 31, 1931.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Petitioner*, vs. THE UNITED STATES OF AMERICA, *Defendant.*	No. 186, In Equity.
LOUISIANA AND ARKANSAS RAILWAY COMPANY *et al.*, *Petitioners*, vs. THE UNITED STATES OF AMERICA, *Defendant.* CONSOLIDATED.	No. 187, In Equity.

LIST OF INTERVENORS IN ABOVE CONSOLIDATED CASES.

Equity No. 186. Intervention No. 1. Intervention of the Board of Commissioners of the Port of New Orleans, field March 8, 1930. (Attorney—John St. Paul, Jr., New Orleans, La., in Int. No. 1)

Equity No. 186. Intervention No. 2. Intervention of the Galveston Chamber of Commerce; Galveston Cotton Exchange & Board of Trade; Houston Chamber of Commerce; Navigation and Canal Commissioners of the

Harris County Houston Ship Channel Navigation District of Harris County, Texas; Beaumont Chamber of Commerce; Beaumont Dock & Wharf Commission; Port Arthur Chamber of Commerce & Shipping; Orange Chamber of Commerce; Texas City Board of Trade; The Cooper Grocery Company; The Shear Coffee Company; Waco Coffee Company, Inc.; Waco Chamber of Commerce and the State of Texas. (Attorneys—Mart H. Royston, Galveston, R. C. Fulbright, Houston, Texas, Jas. J. Shaw, Ball & Simmons, Houston, Texas, R. L. Bobbitt, Attorney General of Texas, Jack Blalock, Assistant Attorney General, Attorneys in Int. No. 2) Filed March 14, 1930.

Equity No. 186. Intervention No. 3. Intervention of Interstate Commerce Commission (Attorneys—Daniel W. Knowlton, Chief Counsel, Washington, D. C.) Filed March 14th, 1930.

Equity No. 186. Intervention No. 4. Intervention of Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; The Trinity and Brazos Valley Railway Company, John A. Hulen, Receiver; Gulf, Colorado and Santa Fe Railway Company; Panhandle and Santa Fe Railway Company, and The Atchison, Topeka and Santa Fe Railway Company (Attorneys—C. S. Burg, Fred L. Wallace, R. S. Outlaw and G. B. Ross, Attorneys in Int. No. 4) Filed April 1, 1930. Motion to intervene, filed March 27, 1930.

Equity No. 186. Intervention No. 5. Intervention of the Attorney General of Louisiana on behalf of the State of Louisiana. Filed March 27, 1930. (Attorneys—Percey Saint, Attorney General of Louisiana.)

Equity No. 186. Intervention No. 6. Intervention of Interstate Commerce Commission, filed April 3, 1930, after order consolidating cases. (Attorneys—Daniel W. Knowlton, Chief Counsel, Washington D. C.) Equity No. 187, Int. No. 3.

Equity No. 186. Intervention No. 7. Consolidated. Intervention of New Orleans Joint Traffic Bureau; Board of Trade of Kansas City, Mo.; Grain Dealers Association of Oklahoma; Oklahoma Millers Association; The St. Joseph Grain Exchange; Omaha Grain Exchange; Atchison Board of Trade; Terrell Chamber of Commerce, and Monroe Traffic Bureau, filed April 4, 1930 (Attorneys—Lutcher M. Walter, John S. Burchmore, Nuel D. Belnap.)

Equity No. 187. Intervention No. 1, as above, Board of Commissioners of the Port of New Orleans. Filed March 27, 1930.

Equity No. 187. Intervention No. 2, as above, Missouri-Kansas-Texas Railroad Company, et al. Filed March 27, 1930. Motion filed March 27, 1930. Intervention. Filed April 1, 1930.

Certified Copy. D. C. Form No. 30

UNITED STATES OF AMERICA)
Southern District of Texas,) ss:
Galveston Division.)

I, L. C. Masterson, Clerk of the United States District Court in and for the Southern District of Texas, do hereby certify that the annexed and foregoing is a List of Intervenors transmitted to Messrs. Andrews, Streetman, Logue & Mobley, on or about April 16, 1930, in Consolidated Causes Nos. 186 and 187, on the Equity Docket of said Court, entitled

The Texas and Pacific Railway Company,

vs.

The United States of America, et al.,

a n d

Louisiana & Arkansas Railway Company, et al.,

vs.

The United States of America, et al.,

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Galveston, this 10th day of March, A. D. 1931.

(Sgd) L. C. Masterson,
Clerk.

(Seal)

By G. Predecki.
Deputy Clerk.

We hereby accept service of a copy of the within and foregoing motion, and waive citation and notice thereon, and consent that same be filed and allowed.

Solicitor General for the United States of America.

D. W. KNOWLTON,
Attorney for the Interstate Commerce Commission.

JAS. V. ALLRED,
Attorney General of Texas,
Attorney for the State of Texas.

R. C. FULBRIGHT,
MART W. ROYSTON,
Attorneys for the Galveston Chamber of Commerce, the Hutchinson Board of Trade, and Associated Intervenors.

R. S. OUTLAW,
C. S. BURG,
F. L. WALLACE,
G. B. ROSS,
Attorneys for the Missouri-Kansas-Texas Railroad Company and Associated Intervenors.